State Bar of Michigan – Children's Law Section (SBM-CLS)

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December 11, 2012

TO: Rep. John Walsh, Chair
House Judiciary Committee

RE: Senate Bill 694

The Children's Law Section of the State Bar of Michigan **OPPOSES** Senate Bill 694. The Council vote was 13-0 against the bill.

The bill is a radical change to the purposes and procedures for establishing family court jurisdiction over children. It authorizes the state to intervene in a currently safe family based on a possibility that a bad parent or caretaker might reappear some day and harm a child. Allowing government involvement in a family based on a speculation of future harm is unnecessary, unwise, and unconstitutional.

The bill is unnecessary. The child welfare system is not the only venue for child protection. The criminal justice system and family law courts can protect children from dangerous parents by entering custody and contact orders. Adding a third forum of a child protection case—especially when a child is safe with a fit parent—is not a necessary state effort. The only remedy unique to the juvenile court is termination of parental rights. That severe remedy provides no more safety to a child than what a fit parent and the judiciary can already provide to protect the child. Further, enacting a definition of "criminality", as this bill does, is also unnecessary. Michigan courts already define "criminality" in a child neglect case to include criminal behavior without a conviction. [1] If adopted as proposed, that definition will not establish jurisdiction because the crime will not be causing the child's home to be unfit, unless the perpetrator adult returns to that home.

The bill is unwise. This bill is not good law or public policy for a number of reasons.

(1) The bill allows state involvement in a family even if a child currently safe. By the use of the disjunctive in the bill—"is *or* will be an unfit place" for the juvenile to live—current unfitness of the home is no longer a necessity for juvenile court intervention. Under the proposed legislation, the possibility of future harm is enough to establish court jurisdiction

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[1] *In re MU,* 264 Mich App 270 (2004).

Mission: The Children's Law Section works to strengthen the delivery and enhance the quality of legal services for children through continued education and trainings, improve the court systems and agencies that serve children's needs through representation of parents and children, and advance the rights of children through changing legislation and policy. We are involved in the court system to represent juvenile offenders and the victims of abuse and neglect and we work to improve the lives of children and families ensuring that they all receive justice.

without proving past abuse or neglect of the child. The state should not be using its limited child protection resources for a child who does not need help now.

(2) Making future unfitness a ground for jurisdiction requires speculation. All court decisions on child safety should be evidence-based with current information. The probability, timing, and nature of future maltreatment require assessment of unknowable circumstances of the accused and the child at that future time. A judgment about future unfitness can then only be based on speculation. In practice, this presents a likelihood of inconsistent application throughout the state. It creates a vast "gray area" of what amount of speculative evidence is sufficient to support jurisdiction. This would be problematic for the bench and bar.

(3) The amendment invites an inappropriate use of limited and costly state child welfare resources in furtherance of what is essentially a private custody fight. [2]

(4) Court involvement would be permitted for the mere possibility of minor neglect in the future. The amendment applies to all the jurisdictional grounds in MCL 712A.2 (b)(2), and not just "criminality." Therefore, only the possibility of future neglect—such as a parent's chronic unemployment or a substance abuse relapse--could trigger court involvement. This creates a larger caseload for already overwhelmed caseworkers, in addition to clogging the court dockets unnecessarily. Juvenile cases have strict timelines that must be adhered to for the sake of achieving permanency for Michigan's children, amendments to legislation that only serve to increase pressure on an overburdened system will have a negative impact on the children currently under the court's jurisdiction. These impacts include: delay in receiving services, increased time to permanency, unnecessary removal from home, and general instability. These outcomes are contrary to the goal of federal and state child welfare legislation.

(5) It is not good policy to mix criminal and child welfare penalties. In Michigan, it is well-established that the purpose of the Juvenile Code is "to protect children from unfit homes rather than to punish their parents." [3] In 2010 the Michigan Supreme Court said, "Criminal punishment should be the only routine consequence of criminal conduct, not the termination of parental rights." [4] Given the large numbers of parent prisoners, and the substantial discretion for a prosecutor to charge a crime in order to establish neglect court jurisdiction, the Court thought " a steep, slippery slope would be created if we were to find that a criminal conviction, *by itself,* constitutes a basis for neglect." [5] But that is precisely what this bill does.

(6) Children could be harmed by state intervention, especially if the agency takes up the cause and becomes the petitioner. Involving child welfare officials in a family is never benign. It is anywhere from disruptive to damaging to subject a family to a CPS investigation, court hearings, child testimony, agency meetings, home visits by caseworkers, appointments with service providers, and other intrusive government oversight that come with agency and

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2 The law does not allow one parent to file a petition to terminate the parental rights of the other parent. "Parent" is not on the statutory list of persons permitted to do that. MCL 712A.19b (1). There is merit in not putting this legal weapon in the arsenal of child custody contestants.

3 *Dep't of Social Svcs v Brock,* 442 Mich 101, 108 (1993).

4 *People v Tennyson,* 487 Mich 730, 742 n. 7 (2010).

5 *Id* at 756 (emphasis in original).

family court involvement. These are necessary measures when a child has actually been harmed. They are unnecessary burdens when the harm to this child may never occur.

The bill is unconstitutional. The bill includes an unconstitutional presumption of parental unfitness from criminal behavior. The presumption is based on any crime against any child committed at any time by any adult caretaker. The Due Process Clause of the Fourteenth Amendment does not permit the use of legislative presumptions against parents that could affect their parental rights. [6] What a presumption does is to shift the burden of proving fitness to the parent, which the United States Supreme Court outlawed in 1972. [7] There is an additional constitutional problem with basing state involvement only on future harm. The Constitution does not permit state interference in the family without a compelling state interest, which is "when a child's safety is threatened". [8] When the child currently has a fit parent, "the compelling circumstances justifying initial interference in the minor child's life no longer exist[s] and the state no longer has any interest or right to intervene" in the parent-child relationship. [9]

Respectfully Submitted,

Jack McKaig

Jack McKaig
Chair of the Legislative Committee
Children's Law Section of the State Bar of MI

Robin Eagleson

Robin Eagleson
Chair
Children's Law Section of the State Bar of MI

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6 *Stanley v Illinois*, 405 US 645 (1972).
7 *Id* at 647.
8 *DHS v Johnson*, 283 Mich App 574, 592 (2009)
9 *Id* at 606.